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A DESERVING DISSENTING OPINION

Shall chivalry continue to scorn the industrial dollar? Is compensation for tortious death of man so inelegant as to shock commercialized Twentieth Century sensibilities? Has romance so strong a claim upon modernity as to destroy the monetary value of human life? A majority opinion of the Supreme Court, by Mr. Justice Sutherland, would seem to trend in that direction, or at least it justified a legal principle based upon it. (Panama R. Co. v. Rock [Nov. 17, 1924], 69 L. Ed., 384 U. S. S. C. A., O. 63, Dec. 15, 1924). There is a brief but cogent dissenting opinion by Mr. Justice Holmes, concurred in by the Chief Justice, Mr. Justice McKenna and Mr. Justice Brandeis. With all the Justices present the vote was close—too close where tottering sentiment falls across a well-trod path of modern industry. It is worthy of note that the veterans of the Court held to the practical, instead of to the sentimental view.

The dissenting Justices expressed the belief that, "Without going into the reasons for the notion that an action (other than appeal) does not lie for causing the death of a human being, it is enough to say that they have disappeared * * *. The decision in the Hubgh Case (6 La. Ann. 495, 54 Am. Dec. 565) stands on nothing better than the classic tradition that the life of a *free* human being (it was otherwise with regard to slaves) did not admit of valuation—which no longer is true sentimentally, as is shown by the statutes, and which economically is false."

The Court was called upon to construe the intent of the executive order continuing in force in the Canal Zone the laws "with which the inhabitants are familiar," which was ratified by Congress in 1912. The majority, after reviewing the jurisprudence of four nations and after analyzing the circumstances involved in the principal case, rid themselves of the influence of both the Spanish and French versions, the modern English policy and that of the several American States as well, and concluded that "the reach of the statute is to be determined by the application of the common law principles."

It appeals strongly that there was a sin of both omission and commission. The opportunity was lost of introducing into an admittedly Americanized Panama Zone the law "with which the inhabitants are familiar." The opportunity was taken to bring to life an inept rule of the common law. The case may be aptly classified as a legal resurrection.

There is another criticism that also seems justified. When one is mindful of Lord Campbell's Act and its adoption in substantially every State in the Union, difficulty is found in suppressing the conviction of an American intention to accept the English version. So to speak, it has become customary law as to which no rule of human conduct presents itself as an accepted measure of justice more highly credentialed. Putting aside therefore the justice of the thing; the appealing economic feature involved, and leaving out of consideration the romantic origin of the premise supporting the majority opinion, the minority view would seem to find ample justification in comity alone. It is not well that conflict occur between federal and state laws when avoidance is possible. It is respectfully suggested that it is not seemly that suitors should have reason to seek the federal courts because of that fact.

The subject treated in the opinion is one which invites legislative intervention. Based upon past experience, the prediction is ventured that the minority view in due course will be reflected in appropriate statutes, for commerce and comity have ways of achieving their end. On occasion they make use of both the petition and the ballot.

Though brief, the discussion stimulates both the imagination and memory and interestingly portrays the birth of an era from the ashes of one long lost. The spirit of the two opinions carries one over a wide range of time and into that dim legendary period of romance, tribal and family wars and sectional conflicts. When knighthood was in flower pride could find no sufficient monetary value for the life of the vaunting, gallant knight who ignominiously bit the dust at a tortious hand. The probability that such a life had no economic value is not being controverted. The ancient doctrine may have been well founded. The principle of the majority opinion therefore is one that flourished in less practical times. It is an exotic in this economic era where the knight is encased in denim instead of steel. The sacredness of the human form divine is far less vocal in contemporaneous society than the orphans' appeal for bread and shelter.

There is another troubling circumstance. If one felt competent to pass judgment, the regret would be expressed that the establishment of the law could not have come about through judicial reasoning, instead of legislative endeavor. The advocate readily understands and appreciates the judicial disinclination to veer from the charted course, even when white waters indicate a submerged wreck. That tendency is the only assurance of stability in law. However, one cannot be unmindful that Lord Campbell had sounded an alarm in England in the first half of the Nineteenth Century, that had not escaped American attention. Many State Legislatures, if not all of them, followed the English Parliament and altered their judicial charts to conform. In fact the English-speaking world seem to have adopted Lord Campbell's Act. It is obvious therefore that in electing between the two courses a well-matured sentiment could have been respected without suspicion of innovation or experimentation.

Mention is made of this circumstance as an influence, not as a reason. Students of government look upon the Supreme Court as a fountain of reason; as the wise Patriarch of the Tribe of States who leads, and never follows, in the onward march of civilization. That is believed to be one of the indefinable but potent elements of strength of the greatest tribunal on earth. It is not contended, therefore, that a criterion is an essential, if an element at all, in its judgments, however consoling may be the support of a crystallized public sentiment. Certain it is, however, that judicial antagonism of established custom is not promotive of stability in law. Wherefore two aspects of judicial approach are made to appear. The one is creation and the other is recognition.

Conscious of the influence of John Marshall upon the very warp and woof of federal law and its stability, attention may be drawn to his stormy judicial career as a refutation of the last suggestion. Concededly one looks in vain for the least contemporaneous approval of his career. Raucous condemnation fell from the lips of men whose progeny now prosper and enjoy liberty and equal opportunity by virtue of the very things their ancestors most condemned. Yet his doctrines live like the Constitution itself. But there is a distinction. John Marshall was building; he was creating, and with no other guide than a far-seeing statesmanlike vision. He did not have the translation of suitable limitations of conduct, furnished by a century and a half of world-wide commercial and industrial experience, that have been enabled to ripen into rules under his regulations. There was no customary law recommending or giving light that needed but to be recognized if sound and proper. Marshall is the creator of the present national commercial era. Indeed one stops to inquire if it could have been achieved in the absence of Marshall's conception of interstate relations? His experience therefore stands in opposition, instead of similarity, to the instant case.

On occasion a bit of homely philosophy is always forgiven by a good-natured Bench

and Bar, whatever its source. Nations, like children, need to shock one into the realization of their growth. It is done with high success by the protruding necessity for enlarg'ng garments. That is the keynote of these remarks. The law must change to suit the age, though the alteration may seem profane to the esthetic. It would be idle to mourn, though one must, over the translation by time of a lisping beauty into a vocal hoyden. It is a condition and not a theory demanding attention and sentiment must be laid away with the lavender and old lace. Mr. Justice Holmes, in an address before the Harvard Law School Association of New York, condensed this practical thought into poetic language: "We, too, need education in the obvious—to learn to transcend our own convictions and to leave room for much that we hold dear to be done away with short of revolution, by the orderly change of law." The course of all nature is forward. Its punishment for stagnation is poison and self-destruction. Its compensation for enterprise is growth and betterment of living.

But there is nothing over which to mourn. Modernity is no less chivalrous in measuring the spiritual, as well as the economic value of the industrial knight. No period ever raised more monuments or cast more medals in commemoration of bravery, sacrifice and unselfish surrender of life in the public interest. If the poetic dream of the plume and the armor and the spear and the moat be dimmed or addled, there is the practical compensation that the former have been turned into the plowshare and the moat has been filled as a prevention against malaria.

THOMAS W. SHELTON.

Mrs. Jiggins, who was reading a newspaper, observed to her husband that the journal contained an article entitled "Women's Work for the Feeble-minded."

Now Mr. Jiggins was in a reactionary mood. So he grunted and said: "I should like to know what women have ever done for the feeble-minded."

"They usually marry them, my dear," replied Mrs. Jiggins sweetly.

NOTES OF IMPORTANT DECISIONS

EMPLOYEE DUMPING CINDERS FROM ENGINES HELD ENGAGED IN INTERSTATE COMMERCE.—The case of Scelfo v. Buffalo, R. & P. R. Co., 207 N. Y. Supp. 455, holds that a railroad employee, injured while emptying cinder buckets removed from trench between tracks into which cinders from engines employed in both intrastate and interstate commerce were dumped, was injured while employed in interstate commerce, and was not entitled to award under the New York Workmen's Compensation Act.

On this question the Court said:

"In this case we have to consider an employee working in or on the plant. In Erie R. R. Co. v. Szary (253 U. S. 86, 40 S. Ct. 454, 64 L. Ed. 794), the employee, Szary, was employed drying sand in stoves in a building near the track, and supplying it to locomotives engaged in both kinds of commerce. He had sanded an engine about 9 o'clock, removed the ashes from the stove, and carried them to the ashpit. He emptied the pail, and left it on the ground, while he went to get a drink of water; while returning for the pail, and crossing the track, he was hit by an engine. The court declined to make distinctions between the acts of service, and held that he was engaged in interstate commerce, saying the acts of service were too intimately related to, and too necessary for, the final purpose, to be distinguished in legal character.

"In Southern Ry. Co. v. Puckett, 244 U. S. 571, 37 S. Ct. 703, 61 L. Ed. 1321, Ann. Cas. 1918B, 69, a wreck had occurred in the yard; while carrying blocks to jack up a car to release an employee who had been caught under the wreck, and to clear the tracks, Puckett stumbled and was injured. It was said:

" 'The object of clearing the tracks entered inseparably into the purpose of jacking up the car and gave the operation the character of interstate commerce.'

"Also an employee, who was carrying bolts to be used in repairing the railroad line and was injured while so doing, was engaged in interstate commerce. Pedersen v. D., L. & W. R. R. Co., 229 U. S. 146, 33 S. Ct. 648, 57 L. Ed. 1125, Ann. Cas. 1914C, 153. A man working in a signal tower and controlling switches is engaged in interstate commerce, as is one operating a pumping station, which consisted of a water tank and a gasoline engine used to supply water to the carrier's engines, whether at the time engaged in interstate or intrastate commerce. Erie R. Co. v. Collins, 253 U. S.

77, 40 S. Ct. 450, 64 L. Ed. 790; Roush v. Baltimore & O. R. Co. (D. C.), 243 F. 712.

"Grybowski v. Erie R. R. Co., 88 N. J. Law, 1, 95 A. 764, is a case in its facts quite identical with the instant case. The deceased employee was a fire cleaner, and was just coming out of an ash pit under the tracks when a locomotive, backing on the track, killed him. The Court says:

" 'The proofs show that the ash pit was a part of the plant of the defendant company, that it was a necessary part of that plant, and that it was used both in interstate and intrastate commerce. The keeping of it clean, and thereby maintaining its effectiveness, was required equally for both kinds of commerce, just as the keeping in repair of tracks or bridges which are used for both kinds of commerce is a necessary incident to each of them.'

"The ash buckets in the trench, when overfilled, would obstruct traffic. To keep this track clear was necessary to the operation of the engines. The injured employee, while dumping the buckets, was clearing the track, was maintaining the effectiveness of the carrier's plant, and was facilitating interstate transportation on his employer's road. The employee, when injured, was engaged in commerce between the states."

CITY LIABLE FOR BREACH OF CONTRACT TO FURNISH WATER FOR FIRE PROTECTION.—The case of Phillips v. Kentucky Utilities Co., 266 S. W. 1064, decided by the Court of Appeals of Kentucky, holds that a city entering commercial field by contracting to furnish water for domestic purposes and fire protection, to residents individually applying and paying therefor, is liable for damages from failure to do so, but not for failure to furnish adequate public fire protection, which is service furnished to all its residents without special charge.

"The city of Elizabethtown having entered the field of commerce by undertaking to furnish to plaintiffs water for domestic purposes, and for protection against fire as alleged in the plaintiffs' petition as amended, is liable for damages resulting from its failure so to do, just as a private citizen would be who had undertaken to do the same thing. This furnishing of water for domestic use and protection against fire is a service which is rendered to those only of its residents who individually applied and paid therefor. This case is not like the case of Kenton Water Co. v. Glenn, 141 Ky. 529, 133 S. W. 573. In that case the water company agreed by the first section of its contract, to furnish water for consumption in private dwellings; by the third section of its contract it agreed to furnish water to the town of Latonia for fire protection; and by section six, the water company was authorized to contract to supply water to private fire plugs and other pipes and apparatuses of private individuals for their own fire protection. Glenn had no contract for a supply of water to a private fire plug for his own fire protection. Plaintiffs, in their amended petition, allege they did have a contract with the city in this case for water for domestic use and for protection against fire."

WHAT AMOUNTS TO "EXTERNAL AND VISIBLE MARKS" UNDER ACCIDENT POLICY.—"External and visible marks" of injury required by an accident insurance policy need not be immediately visible or enduring. It is held in Feis v. United States Ins. Co., 201 N. W. 558, decided by the Supreme Court of Nebraska, that where the evidence shows that the insured received a violent blow upon the stomach sufficient to knock him down, to affect his breathing, and to cause a slight pallor in his face at the time of the accident, and there is also medical testimony that such a blow would probably cause a reddening of the skin which would soon disappear, the requirements of the policy as to "external and visible marks" are sufficiently met.

We quote a portion of the Court's opinion as follows:

"Were there any 'external and visible marks?' The words must not be strictly, but liberally, construed as regards the insured. It is not required that such marks shall be either immediate or enduring in their nature. What is essential is that there is some manifestation abnormal in its nature and affecting the physical man, the existence of which may be ascertained by observation or examination. Pennington v. Pacific Mut. Life Ins. Co., 85 Iowa, 468, 52 N. W. 482, 39 Am. St. Rep. 306. The question of what constitutes an external and visible mark has been before the courts in a number of cases. A case very similar to this is Horsfall v. Pacific Mutual Life Ins. Co., 32 Wash. 132, 72 P. 1028, 63 L. R. A. 425, 98 Am. St. Rep. 846. The insured in that case had overtaxed his strength by a heavy lift. Immediately thereafter he showed pallor, he trembled, and perspiration stood out upon his forehead. Such indications were held by the court proper to be submitted to the jury to determine whether they were visible and external marks within the meaning of the words in the policy. See, also, Modern Woodman Accident

Ass'n v. Shryock, 54 Neb. 250, 74 N. W. 607, 39 L. R. A. 826; Barry v. United States Mutual Accident Ass'n, 23 F. 712; Peterson v. Locomotive Engineers' Mutual Life & Accident Ins. Ass'n, 123 Minn. 505, 144 N. W. 160, 49 L. R. A. (N. S.) 1022, and note, Ann. Cas. 1915A, 536; Lewis v. Brotherhood Accident Co., 194 Mass. 1, 79 N. E. 802, 17 L. R. A. (N. S.) 714; Root v. London Guarantee & Accident Co., 92 App. Div. 578, 86 N. Y. S. 1055; 4 Joyce, Insurance (2d Ed.), § 2617; Fuller, Accident and Employers' Liability Insurance, 121. Under the authorities cited, there were some 'external and visible marks of an injury.'"

INSTRUCTION STATING WRONG DEGREE OF CARE REQUIRED OF CARRIER HELD NOT REVERSIBLE ERROR.—The Supreme Court of Missouri, in the case of Weissman v. Wells, 267 S. W. 400, holds that in a passenger's action for injuries in a street car collision, an instruction that the defendant railway company was not required to exercise any degree of care or foresight that was not reasonably practicable, although erroneous as not stating the proper measure of care, was not alone sufficient to warrant the granting of a new trial. As this instruction, in practical effect, amounts to a charge that the defendant is required to exercise only reasonable care, there appears no reason justifying the decision in this case. The court refers to and quotes from the Benjamin case, hereinafter mentioned, and depends upon that case as authority for its holding on this point. However, in the Benjamin case there was an instruction given in behalf of the plaintiff correctly defining the degree of care required of the defendant carrier, while in the instant case there was no such instruction. Therefore, the jury followed an instruction requiring a lesser degree of care than the law imposes. In the Benjamin case the Court mentioned that the instruction criticised was confusing to the jury, and it might be assumed that it was confusing on account of being in conflict with the other instruction correctly defining the degree of care required. We quote a portion of the Court's opinion as follows:

"This instruction told the jury that defendant was not 'required to exercise any degree of care or foresight that was not reasonably practicable,' and further that, if the jury found that 'defendant had used all care and foresight reasonably practicable under the circumstances and that the accident happened without negligence on the part of defendant,' then plaintiff could not recover. An instruction of like purport was approved in Feary v. Metropolitan St. Ry. Co., 162 Mo. 75, 62 S. W. 452. But later, in Benjamin v. Metropolitan St. Ry. Co., 245 Mo. 598, 151 S. W. 91, an instruction, using the word 'unreasonably' in the same connection, was criticized. Judge Valliant said, loc. cit. 614 (151 S. W. 96):

"'The adverb "reasonably," used in the instruction to qualify the adjective "practicable," introduces an element of uncertainty into the sentence. The duty of the carrier is to exercise the highest degree of care practicable. The word practicable means "capable of being done or accomplished with available means or resources." (Webster.) The element of reasonableness is in that definition. What is unreasonable is not practicable. But when the word "reasonably" is used to qualify the word "practicable," it is confusing, and is liable to misconstruction. The law is always reasonable, and it considers it reasonable to require of carriers a high degree of care, but that fact would not justify an instruction to the jury that the law requires the carrier to exercise a reasonably high degree of care. In that connection the word "reasonably" would so qualify the word "high" as to reduce the phrase to "reasonable care." We do not approve the word "reasonably" as used in this instruction, but, if that were the only error in the case, we would not say the error was sufficient to justify the granting of a new trial.'"

Father: "So you propose to take my daughter from me without any warning?"

Nervous Young Man: "Not at all. If there is anything concerning her you want to warn me about, I'm willing to listen."—Answers, London.

Motor Cop (after hard chase): "Why in heck didn't you stop when I shouted back there?"

Driver (with only five bucks, but presence of mind): "I thought you just said 'Good morning, Senator.'"

Cop: "Well, you see, Senator, I wanted to warn you about fast driving through the next township."—Selected.

I heard your son was an undertaker. I thought you said he was a physician."

"Not at all. I just said he followed the medical profession."—Selected.

Rastus was sporting proudly a new shirt, when a friend asked: "How many yards does it take for a shirt like that?"

Rastus replied: "I got three shirts like this out of one yard last night."—The Pathfinder.

LOCAL STATE GOVERNMENT AS AFFECTED BY THE COMMERCE CLAUSE*

The proper apportionment of sovereign powers between the States and the United States was the most delicate and difficult task of the framers of our Constitution. By the adjustment made the States granted a large portion of their sovereign powers to the nation thus created, but fearing that they had been too liberal they practically conditioned their acceptance of the Constitution on the adoption of reservations. Those reservations became the first ten amendments.

The fact and political expediency of reserved powers in the States is not questioned; however, when the boundary line between federal power and state rights has been for determination, wide differences of opinion among politicians and statesmen have been evident. Such differences, frequently sectional, were generally the result of theories or principles growing out of economic interests rather than any rational conclusions based on constitutional interpretation or construction.[1] There have likewise been divergent and conflicting views among our judges, both federal and state, the result, perhaps in part, of that bias which comes from training and environment but rarely affected by political affiliations or sectional interests.

It is not my purpose here to attempt to trace the history of the political or judicial conflicts over state rights. That has frequently been done and nowhere more entertainingly or more judicially than by Charles Warren in his most delightful and useful History of the Supreme Court. Here it is proposed as definitely as may be to draw, as it now exists, the boundary under the commerce clause of the Constitution between state rights and federal power.

*The writer of this article, Edgar Watkins, B. L., LL.D., will be known to our readers as the author of Watkins on Shippers and Carriers, now in its third edition.

(1) Warren, The Supreme Court in United States History, vol. 1, p. 267, vol. 3, p. 56 seq.

The legislative powers granted the Congress of the United States by Section 8 of Article 1 of the Constitution are stated in broad language. In so far as the powers there stated relate to the well known and indispensable attributes of a nation, there is little or no room for doubt.

The Fourteenth Amendment is a limitation on the manner of exercising powers reserved to the State rather than a transfer of power to the federal government.

Conflicts between state rights and federal power usually result from the exercise of power by the Congress under the commerce clause and the restriction of state power by the Fourteenth Amendment.

The words "To regulate commerce with foreign nations, and among the several States, and with the Indian tribes," are at this time the source of more power in the national legislature than any other clause of the Constitution; and, although prior to 1840 this clause had been construed by the Supreme Court in only five and prior to 1870 in only thirty cases, cases under this clause are now of almost daily occurrence.[2]

A brief history of the commerce clause is appropriate. The Articles of Confederation contained no such provision and one of the objections thereto by the States, as voiced by the State of New Jersey, was:

"We are of opinion that the sole and exclusive power of regulating the trade of the United States with foreign nations ought to be clearly vested in the Congress."

On February 3, 1781, the Colonial Congress resolved:

"That it is indispensably necessary that the United States in Congress assembled should be vested with a right of superintending the commercial regulations of every State, that none may take place that shall be partial or contrary to the common interest."

On July 13, 1785, Congress considered the report of a committee which had reported:

(2) Senate Document No. 96, annotating the Constitution to January 1, 1923, it is interesting to note contains 114 pages of text and citations relating to this clause.

"That the first paragraph of the 9th of the Articles of Confederation be altered, so as to read thus, viz.:

'The United States in Congress assembled shall have the sole and exclusive right and power of determining on peace and war, except in the cases mentioned in the 6th article—of sending and receiving ambassadors—entering into treaties and alliances—*of regulating the trade of the States*, as well *with foreign nations as with each other.*' "

Among state resolutions passed about the same time that of Virginia may be copied as representative. On January 21, 1786, the Virginia House of Delegates resolved:

"That Edmund Randolph, James Madison, Jun., Walter Jones, St. George Tucker, Meriwether Smith, David Ross, William Ronald and George Mason, Esquires, be appointed commissioners, who, or any five of whom, shall meet such commissioners as may be appointed by the other States in the Union, at a time and place to be agreed on, to take into consideration the trade of the United States; to examine the relative situation and trade of the said States; to consider how far a *uniform system* in their *commercial regulations may be necessary* to their common interest and their *permanent harmony.*"

The clause as it now is, except the reference to trading with the Indians, was in the first draft of the Constitution presented by Charles P. McHenry to the Constitutional Convention (see Elliott's Debates, vol. 1, p. 147). No change was made when the committee of five reported a draft of a constitution August 6, 1787 (ibid 226).

On August 18, 1887, there was added among other powers one reading:

"To regulate affairs with the Indians, as well within as without the limits of the United States."

The committee on revision combined the original with this and the clause became as it now is (ibid 300).

The Convention defeated on August 29, 1787, a motion reading:

"That no act of the legislature for the purpose of regulating the commerce of the United States with foreign powers, or among the several States, shall be passed without the assent of two-thirds of the members of each House."

There seems to have been no recorded discussion of the commerce clause itself.

Madison (Elliott's Debates, vol. 5, p. 434, for August 16, 1887) says:

"The clause for regulating commerce with foreign nations, etc., was agreed to, nem. con."

(See also Elliott's Debates, vol. 1, p. 245.)

Thus the commerce clause, which attracted so little attention in the convention which agreed to the Constitution of which it is a part, and which was permitted to remain almost dormant prior to 1890 is the source of much the largest and most important of our federal legislation. Among the more important being the Anti-Trust Laws, the Acts to Regulate Commerce, including the several safety appliance laws, and the Employers' Liability Act, the Food and Drug Acts, the Federal Trade Commission Act, the White Slave Act, the Merchant Marine Act and in part at least the Federal Water Power Act.

The Supreme Court has said that insurance is not commerce,[3] but otherwise has given the broadest meaning to the term. In another place[4] and citing cases beginning with Gibbons v. Ogden[5] I have summarized these decisions by saying:

"Interstate commerce, as defined in the Constitution of the United States, is commerce 'among the several States,' but the Constitution does not define commerce. What 'commerce' includes cannot be definitely stated or limited. Its primary meaning is traffic, purchase and sale, but it means also intercourse, interchange or mutual exchange of commodities. It in-

(3) Paul v. Virginia, 8 Wall. 168, 19 L. Ed. 357. Question re-examined and principle reaffirmed. New York Life Ins. Co. v. Deer Lodge County, 231 U. S. 495, 58 L. Ed. 332, 34 Sup. Ct. 167.

(4) Watkins Shippers & Carriers, 3rd Ed., vol. 1, sec. 2.

(5) Gibbons v. Ogden, 9 Wheat 1, 22 U. S. 1, 6 L. Ed. 23 (1824); Lottery case. Champion v. Ames, 188 U. S. 321, 345, 47 L. Ed. 492, 23 Sup. Ct. 321; Simpson et al. R. R. Comm. of Minnesota v. Shepard ("Minnesota Rate Case"), 230 U. S. 352, 57 L. Ed. 1511, 33 Sup. Ct. 729, and cases cited; United States v. Swift & Co., 122 Fed. 529, Modified and subject discussed, Swift & Co. v. United States, 196 U. S. 375, 49 L. Ed. 518, 25 Sup. Ct. 276.

cludes the carrying by independent carriers of things or commodities which are ordinarily the subject of traffic and which have in themselves a recognized value in money. The intercourse includes all the preliminary, intervening and consummating acts, instrumentalities and dealings that bring about the sale or exchange of commodities. It embraces transportation by land and water and the means and appliances necessary thereto, including transportation of person and property.

"The transmission of intelligence by telegraph or telephone is an agency of commerce and intercommunication. The powers of Congress over interestate commerce 'must keep pace with the progress of the country, and adapt themselves to the new development of time and circumstances."[6] The decisions in the White Slave cases[7] are but an adaptation to modern-day developments of the principles stated in Gibbons v. Ogden, *supra*.

"The importation of films showing a prize fight and the transportation thereof in interstate commerce may be prevented under the commerce clause.[8]

"That Congress may directly regulate interstate commerce does not mean that the States may not in the absence of federal action and under the police power of the State pass regulations which may indirectly affect such commerce. Where diversity of treatment is possible, until Congress acts there is room for state regulation which may have an indirect effect on interstate commerce. The power of Congress being supreme, when there is federal action state regulations are thereby superseded. As to all external concerns Congress alone may act. As to 'internal concerns which affect the States generally,'[9] Congress having failed to act, a State may legislate in 'safeguarding life and property and promoting comfort and convenience within its jurisdiction,' although such legislation may extend incidentally to the operation of the carrier in the conduct of interstate business.[10]

"A transaction not itself within the meaning of the term 'interstate commerce' may be regulated by Congress under the commerce clause. This on the principle that Congress has the power to protect interstate commerce from burdens, although the thing which causes the burden is not such commerce."[11]

Federal power under the commerce clause, as to which there arise conflicts between the States and the nation, may be broadly described as falling within three general classes: Taxation, the regulation of business and the regulation of railroads. How the general principles hereinbefore stated have been applied to each of these classes of questions will now be discussed.

(6) Pensacola Tel. Co. v. Western Union Tel. Co., 96 U. S. 1, 9; 24 L. Ed. 708; Western Union Tel. Co. v. Texas, 105 U. S. 460, 26 L. Ed. 1067; Western Union Tel. Co. v. Pend'eton, 122 U. S. 347, 30 L. Ed. 1187, 7 Sup. Ct. 1126; Postal Tel. Co. v. City of Mobile, 179 Fed. 955; Western Union Tel. Co. v. Crovo, 220 U. S. 364, 55 L. Ed. 498, 31 Sup. Ct. 399; Western Union Tel. Co. v. Commercial Milling Co., 218 U. S. 406, 54 L. Ed. 1088, 31 Sup. Ct. 59. Correspondence schools are engaged in commerce, International Text Book Co. v. Pigg, 217 U. S. 9, 54 L. Ed. 678, 30 Sup. Ct. 481. Wages of railroad employees are under special circumstances within the regulatory power granted by the commerce clause. Wilson v. New, 243, U. S. 332, 61 L. Ed. 755, 37 Sup. Ct. 298.

(7) Hoke v. United States, 227 U. S. 308, 57 L. Ed. 523, 33 Sup. Ct. 281, 43 L. R. A. (N. S.) 906, Ann. Cas. 1913E 905; Athanasaw v. United States, 227 U. S. 326, 57 L. Ed. 528, 33 Sup. Ct. 285; Ann. Cas. 1913E. 911; Bennett v. United States, 227 U. S. 333, 57 L. Ed. 531, 33 Sup. Ct. 288. That a State, Congress having acted, may not forbid the importation of women for immoral purposes, is held in State v. Harper, 48 Mont. 456, 138 Pac. 495, 51 L. R. A. (N. S.) 157. See also Caminetti v. U. S., 242 U. S. 470, 61 L. Ed. 442, 37 Sup. Ct. 192.

(8) Weber v. Freed, 239 U. S. 325, 60 L. Ed. 308, 36 Sup. Ct. 131; Ann. Cas. 1916C, 317; United States v. Johnson, 232 Fed. 770.

(9) Gibbons v. Ogden, supra.

(10) Simpson et al., R. R., etc., Comm. of Minnesota v. Shepard ("Minnesota Rate Case"), 230 U. S. 352, 57 L. Ed. 1151, 33 Sup. Ct. 729, citing cases; see also Chicago, R. I. & P. Ry. Co. v. Hardwick Farmers' Elevator Co., 226 U. S. 426, 57 L. Ed. 284, 33 Sup. Ct. 174, reversing Hardwick Farmers' Elevator Co. v. Chicago, R. I. & P. Ry. Co., 100 Minn. 24, 124 N. W. 819. When Congress acts prior state laws in conflict are superseded, Northern Pac. Ry. Co. v. State of Washington, 222 U. S. 370, 56 L. Ed. 237, 32 Sup. Ct. 160; Barrett v. City of New York, 232 U. S. 14, 58 L. Ed. 483, 34 Sup. Ct. 203. The question is well discussed and properly decided in People v. Erie R. Co., 135 App. Div. 767, 119 N. Y. Supp. 893, where it was held that the fact that Congress had legislated, although the legislation was suspended, superseded the state law. This case was reversed on appeal, although it would seem that the lower court correctly stated the law; People v. Erie R. Co., 198 N. Y. 369, 91 N. E. 849. For an elaborate discussion, if not a correct conclusion, see So. Ry. Co. v. R. R. Com. of Indiana, 179 Ind. 23, 100 N. E. 337. This case was reversed because Congress had acted. See also So. Ry. Co. v. Railroad Com. of Indiana, 236 U. S. 439, 59 L. Ed. 661, 35 Sup. Ct. 304. See a restatement of this principle of the text by Mr. Justice Butler in Michigan Pub. Utilities Comm. v. Duke, 69 L. Ed. (ad. pam.) 207, 209.

(11) Houston E. & W. T. R. Co. v. United States, 234 U. S. 342, 58 L. Ed. 1341, 34 Sup. Ct. 833 (called the Shreveport case). The possible applicability of this principle to the Child Labor Act was discussed in an article by the writer in Case and Comment April, 1917, p. 906, but the principle was not applied by the Supreme Court. Hammer v. Dagenhart, 247 U. S. 251, 62 L. Ed. 1101, 38 Sup. Ct. 529, 3 A. L. R. 649. The principle of the Shreveport case, given recognition in the Transportation Act, was discussed and applied in Railroad Commission v. Chicago, B. & Q. R. Co., 257 U. S. 563, 66 L. Ed. 371, 22 A. L. R. 1086, 42 Sup. Ct. Rep. 232.

The limits the Fourteenth Amendment puts on the power of States in exacting taxes are not within the scope of this paper. The protection the commerce clause gives commerce against state taxes will be briefly discussed. The exclusive power of Congress prevents interfering state legislation "regardless of the purpose with which it was enacted." The "local business" of a foreign corporation chiefly engaged in interstate commerce may, however, be taxed by the State where such business is transacted, but the State cannot require the corporation, as a condition of the right to do a local business therein, to submit to a tax on its interstate business or on its property outside the State, nor can a license fee or excise tax of a given per cent of the entire authorized capital of a foreign corporation doing both a local and interstate business in several States be levied by a State. Such a license fee or tax is unconstitutional and void as illegally burdening interstate commerce and also as wanting in due process because laying a tax on property beyond the jurisdiction of the State. These principles recently stated by Mr. Justice Butler summarize the law as announced by the Supreme Court.[12]

One who as agent of a non-resident principal takes orders on such principal for the purchase of goods held in such other State, and who when the goods are shipped to him receives and delivers them in the original packages to his customers is engaged in interstate commerce and cannot be taxed by the State where the goods are delivered.[13]

In Ozark Pipe Line Corporation v. Monier, decided by the Supreme Court January 12, 1925, it was held that an annual franchise tax, required under the laws of the State of Missouri, violated the commerce clause of the Constitution when sought to be applied to a Maryland corporation whose business in Missouri was "exclusively in interstate commerce," although the corporation maintained an office, purchased supplies, employed labor, maintained and operated telephone and telegraph lines and automobiles, all of which being exclusively in furtherance of its interstate business.

In the majority opinion the Court distinguished between cases where foreign corporations engage in both interstate and intrastate commerce[14] and cases where, as in the case before the Court, all the acts were "accessory to and inhering in the right to" do an interstate business.

Mr. Justice Brandeis dissenting said that the Missouri tax "is laid upon the privilege of carrying on business in *corporate form.*" But the very purpose of using the corporate form was to do a business which can be regulated only by the federal government and, if the learned dissenting Justice were correct in his argument, States could tax foreign corporations doing only interstate business and could not tax non-resident individuals doing an exactly similar business. This argument of Mr. Justice Brandeis is answered in a former decision of the Court[15] where it was said:

"To carry on interstate commerce is not a franchise or a privilege granted by the State; it is a right which every citizen of the United States is entitled to exercise under the Constitution and laws of the United States; and the accession of mere corporate facilities as a matter of convenience in carrying on their business cannot have the effect of depriving them of such right unless Congress should see fit to interpose some contrary regulation on the subject."

The boundary of the State's power to tax in respect of interstate commerce is rather definitely fixed and it may be stated as the sum of the authorities that no State can

(12) Air-Way Corp. v. Day, 266 U. S. 71, 81, 69 L. Ed. 10.

(13) Kehrer v. Stewart, 197 U. S. 60, 49 L. Ed. 663, 25 Sup. Ct. 403; Standard, etc., Mfg. Co. v. U. S., 226 U. S. 20, 57 L. Ed. 107, 33 Sup. Ct. 9; Crossman v. Lurman, 192 U. S. 189; American Steel & Wire Co. v. Speed, 192 U. S. 500, 48 L. Ed. 401, 24 Sup. Ct. 234; Armour Packing Co. v. Lacy, 200 U. S. 226, 50 L. Ed. 451, 26 Sup. Ct. 232; Cheney Bros. Co. v. Massachusetts, 246 U. S. 147; Rearick v. Pennsylvania, 203 U. S. 507; American Steel & Wire Co. v. Speed, 192 U. S. 500, 48 L. Ed. 538, 24 Sup. Ct. 365.

(14) Cheney Bros. Co. v. Massachusetts, 246 U. S. 147, 62 L. Ed. 632, 38 Sup. Ct. 295, and other cases cited.

(15) Crutcher v. Kentucky, 141 U. S. 47, 35 L. Ed. 649, 11 Sup. Ct. 851.

tax either the franchise to do or the doing of an interstate business, that when interstate commerce has ended or has not begun property theretofore moving or which may thereafter move in interstate commerce has come to or is at rest in a State, such property is subject to local taxation,[16] and that the portion of what Mr. Justice Sanford calls a "unitary business," part of which is interstate and part of which is intrastate, which is intrastate may be taxed locally provided the apportionment between the two is not "shown to be arbitrary or unreasonable."[17]

The regulation of business in general has in federal law its most conspicuous illustrations in the Anti-Trust Laws and in the Act creating a Federal Trade Commission. Manufacturing is not commerce. "Commerce," said the Supreme Court, "succeeds to manufacture and is not a part of it."[18] Special forms of commercial contracts may be prescribed by States.[19] Requiring a license to deal in securities, so-called Blue Sky laws, is a valid state regulation, although the securities may have been transported from another State[20] and a censorship of motion picture films brought from other States, may be prescribed by the State where the films are exhibited.[21]

The right to regulate interstate transportation being unquestioned, the only difficulty is in determining when transportation is interstate. Not only may interstate transportation be regulated by the Congress, but the facilities therefor are equally subject to regulation.[22]

The original Act to Regulate Commerce, and this is also true of subsequent Acts, excluded from its provisions transportation "wholly within one State."[23] Many state railroad commissions prescribed charges for intrastate transportation which gave the local shipper an advantage over his competitor whose shipment had to move interstate. At first the Interstate Commerce Commission held that it had no power to remedy this injustice, but later changed its opinion and required a removal of the discrimination.[24]

The Supreme Court, in what is called the Shreveport case, sustained the order of the Commission[25] because, as said by Mr. Justice Hughes, Congress has the right "to keep the highways of interstate communication open to interstate traffic upon fair and equal terms." The Congress has recognized the rule of this decision and has prescribed a procedure governing the Interstate Commerce Commission when state rates are involved and given definite statutory power to grant relief, which goes to the extent of authorizing the regulation of intrastate rates.[26]

The Transportation Act, 1920, substantially enlarges the field of federal regulation. Speaking of this Act Mr. Justice Brandeis said it "introduced into the federal legislation a new railroad policy"; that it "sought to insure, also, adequate transportation service. Under these enlarged powers in the New England Division Case[27] joint through rates were

(16) Bacon v. Illinois, 227 U. S. 504, 57 L. Ed. 615, 33 Sup. Ct. 299; Susquehanna Coal Co. v. South Amboy, 228 U. S. 665, 57 L. Ed. 1015, 33 Sup. Ct. 712; Pittsburg, etc., Coal Co. v. Bates, 156 U. S. 577, 584, 39 L. Ed. 538, 15 Sup. Ct. 415; Brown v. Houston, 114 U. S. 622, 29 L. Ed. 257, 5 Sup. Ct. 1091; Diamond Match Co. v. Ontanagon, 188 U. S. 96, 47 L. Ed. 394, 23 Sup. Ct. 266; Western Oil Ref. Co. v. Lipscomb, 244 U. S. 346, 61 L. Ed. 1181, 37 Sup. Ct. 623; Coe v. Errol, 116 U. S. 517, 524, 29 L. Ed. 715, 6 Sup. Ct. 475.

(17) Bass, Ratcliff & Gretton v. Tax Commission, 266 U. S. —, 69 L. Ed. 45.

(18) United States v. Knight & Co., 156 U. S. 1, 39 L. Ed. 325, 15 Sup. Ct. 249, Hammer v. Dagenhart, 247 U. S. 251, 62 L. Ed. 1101; 38 Sup. Ct. 529, 3 A. L. R. 649; Bailey v. Drexel Furniture Co., 259 U. S. 20, 66 L. Ed. 817, 42 Sup. Ct. 449.

(19) Covington, etc., Bridge Co. v. Kentucky, 154 U. S. 204, 38 L. Ed. 962, 14 Sup. Ct. 1087.

(20) Merrick v. Halsey, 242 U. S. 568, 61 L. Ed. 498, 37 Sup. Ct. 224; Hall v. Geiger-Jones Co., 242 U. S. 539, 61 L. Ed. 480, 37 Sup. Ct. 217; Caldwell v. Sioux Falls, etc., Co., 242 U. S. 559, 61 L. Ed. 493, 37 Sup. Ct. 224.

(21) Mutual Film Corp. v. Ohio, 236 U. S. 230. The transportation of films in interstate commerce may, however, be regulated by Congress. Weber v. Freed, 239 U. S. 325, 60 L. Ed. 308, 36 Sup. Ct. 131.

(22) Watkins Op. Cit., vol. 1, sec. 9, seq.

(23) Watkins Op. Cit., sec. 336.

(24) Railroad Comm. of La. v. St. L. & S. W. Ry. Co., 21 I. C. C. 31.

(25) H. E. & W. T. Ry. Co. v. United States, 234 U. S. 342, 59 L. Ed. 1341, 34 Sup. Ct. 833; Watkins Op. Cit., sec. 44; and see article by the writer, Case and Comment, vol. 23, p. 372, seq.

(26) Paragraphs 3 and 4 of Section 13, Acts to Regulate Commerce; Sec. 416 Transportation Act 1920; Watkins Op. Cit., secs. 393A and 393B.

(27) The New England Division case (Akron, C. & Y. R. Co. v. United States), 261 U. S. 184, 67 L. Ed. 605, 43 Sup. Ct. 270.

divided among the carriers, parties thereto, not on the basis of service rendered, but according to the revenue needs of some; and, applying the principle, a state railroad a few miles in length, whose business was more intrastate than interstate, was compelled under the recapture clause of the Transportation Act to surrender to the federal government, to be administered under the statute, a portion of its earnings in excess of a reasonable return on its investment.[28] The Chief Justice delivering the opinion and with reference to the argument that the rights of the States were invaded, said:

"In solving the problem of maintaining the efficiency of an interstate commerce railway system which serves both the States and the nation, Congress is dealing with a unit in which state and interstate operations are often inextricably commingled. When the adequate maintenance of interstate commerce involves and makes necessary on this account the incidental and partial control of intrastate commerce, the power of Congress to exercise such control has been clearly established."

While there has been an enormous volume of decisions applying the commerce clause and vindicating the paramount power of the Congress over interstate and foreign commerce, the principles of all such decisions are fully and clearly stated by Chief Justice Marshall in Gibbons v. Ogden. Later cases are but commentaries and elaborations of the opinion of this great judge. The commerce clause gives power to the federal government to whatever extent necessary to see that interstate commerce shall be free from all local handicaps.

EDGAR WATKINS.

Atlanta, Ga.

(28) Dayton-Goose Creek Ry. Co. v. United States, 263 U. S. 456, 68 L. Ed. 216.

Booth Tarkington met a negro woman with her youthful family.

"So this is the little girl, eh?" Tarkington said to her as she displayed her children. "And this sturdy little urchin in the bib be longs, I suppose, to the contrary sex."

"Yassah," the woman replied; "yassah, dat's a girl, too."

ANIMALS—INJURY BY BEES

AMMONS v. KELLOGG

102 So. 562

(Supreme Court of Mississippi, January 26, 1925)

The owner of bees who has reasonable notice of the vicious character of such bees in attacking animals is liable for the damages resulting therefrom where he places the bees in proximity to where he knows such animals will be used.

Boddie & Farish, of Greenville, for appellant.

Wynn & Hafter, of Greenville, for appellee.

ETHRIDGE, J. The appellant was defendant below, and prosecutes this appeal from a judgment against him for $250 for the value of horses killed by bees of the defendant.

(2) It appears that the plaintiff, Kellogg, was a tenant on certain lands through which a drainage canal ran. Ammons lived near and secured permission from the drainage commissioners to place bee hives upon the canal embankment elevated some feet above the surrounding ground. The plaintiff, Kellogg, and his son were plowing on Kellogg's farm near the said embankment. A large swarm of bees came from the direction of the defendant's bee hives and stung his horses to the extent that they died, and also stung the plaintiff and his son. It appears that the defendant had about 82 bee hives, and, after they stung the plaintiff, his son, and his horses, he stated, so they testified, that the bees had stung his horses on a prior occasion. There was also evidence that another horse had been stung by the bees, but the plaintiff failed to show that this came to the knowledge of the defendant. The issue was submitted to the jury on instructions presenting the theory that, if the defendant knew of the character and disposition of the bees, and that they are prone to attack people and animals, defendant was liable, and also on the theory that it was not necessary for the bees to be specifically identified as the bees of defendant, but that, if they came from the direction of the defendant's hives, and were in close proximity to the hives, the jury were authorized to find from the circumstances that the bees belonged to the defendant.

The Court instructed the jury for the defendant, first, that the plaintiff must prove that the bees which stung the plaintiff's horses were

the property of the defendant; and, second, that the defendant was negligent in the placing or keeping of his bees, and that it was because of the negligence on the part of the defendant that caused the loss of plaintiff's horses; and that the defendant had a perfect right to keep bees, they being useful and serviceable property, the only duty imposed on him by law being to place and maintain them in a reasonably safe place and manner; also that the jury must believe from the evidence that the defendant had notice or knew that bees were dangerous and were likely to sting animals under the circumstances that existed at the time the animals were killed.

(1) There seems to be no direct case in our own reports discussing the liability of the keeper of bees for injury done by them, but it seems to be the general rule in other States that, as bees are useful to society, and are property of value, the ordinary rule as to wild animals, imposing absolute liability for the injuries inflicted by them, is not applicable to bees, but the rules of domestic animals; that is, that the owner must know of their vicious tendencies, and that the owner is under a reasonable duty to place bees so they will not come in contact with persons traveling roads and similar places.

The learning on the subject is collated and discussed in Parsons v. Manser, 119 Iowa, 88, 93 N. W. 86, 62 L. R. A. 132, 97 Am. St. Rep. 283, and notes.

We think from the facts in the record the jury had a right to find for the plaintiff, and the judgment will be affirmed.

Affirmed.

NOTE—*Liability for Injuries by Bees.*—All of the authorities make it clear that the true basis of liability for injuries done by bees is negligence on the part of the owner either in the location of the hives or in the manner of their manipulation. Earl v. Van Alstine, 8 Barb. (N. Y.) 630; Tellier v. Pelland, 5 Rev. Legale (Que.) 61; Olmsted v. Rich (1889), 3 Silv. Sup. (N. Y.) 826, 6 N. Y. Supp. 826; Petey Mfg. Co. v. Dryden (1904), 5 Penn. (Del.) 166, 62 Atl. Rep. 1056; O'Gorman v. O'Gorman (1903), 2 Irish Rep. 573; Parsons v. Manser (1903), 119 Ia. 88, 93 N. W. Rep. 86, 62 L. R. A. 132; Lucas v. Pettit (1906), 12 Ont. L. Rep. 448, 97 A. St. Rep. 283.

Attempts have been made to impose a liability on the owner at all events for injuries done by his bees, but Judge Selden, in Earl v. Van Alstine (8 Barb. N. Y. 630), made it so clear that there could not and should not be a liability at all events, and that the liability must depend upon negligence, that the Courts have generally followed it. The contention was made in this case that, as bees are classed as ferae naturae for the purpose of ownership, they should also be so classed for the imposition of liability for injuries done by them. The learned Judge argued that this did not follow, for hares and doves were ferae naturae and yet no one would consider them so fierce as to impose liability on the owner without negligence on his part for injuries done by them.

This case, and Parsons v. Manser (119 Ia. 88, 93 N. W. Rep. 86, 62 L. R. A. 132, 97 Am. St. Rep. 283), clearly indicate the effect upon decisions of the judicial point of view. Judge Selden was evidently a lover of honey and probably of bees also. Judge Ladd, who wrote the opinion of the court, in Parsons v. Manser, evidently harbored a grudge from childhood, although he follows the decision in Earl v. Van Alstine, for he says of bees: "Their disposition to make themselves felt is a matter of common observation from early childhood." Doubtless had Judge Ladd written in Earl v. Van Alstine the rule would have been that the owner is liable absolutely for all injuries done by his bees on the ground of their inherent viciousness.

It appears from Tellier v. Pelland (5 Rev. Legl. [Que.] 61), that in Quebec the statute makes the owners of domestic animals liable for injuries done by them and in this case the Court holds bees come within that statute.

If negligence is sought to be based upon the fact that bees have a vicious nature it will be necessary for the plaintiff to show that the particular bees were generally vicious and that notice of that fact had been brought home to the owner. Earl v. Van Alstine (1850), 8 Barb. (N. Y.) 630; Petey Mfg. Co. v. Dryden (1904), 5 Penn. (Del.) 166, 62 Atl. Rep. 1056.

The Courts are not prepared to hold that bees are generally vicious and that their owners are charged with notice of that fact, but take the opposite view, that their natural propensities are not vicious and require proof of viciousness, and notice thereof to the owner in each case That is to say, that in case of injury by bees the plaintiff must show the bees to have been vicious, and in the habit of stinging persons and animals whenever opportunity offered; and further, that the owner had been informed of this propensity and had neglected to correct it or to remove the bees.

Since the owner of the bees has entire control of the location of their habitation, he is bound to exercise care in locating them so as not to cause injury to others. The maxim "So use your own as not to injure others" (Sic utere tuo ut alienum non loedas) applies. It is negligence to locate the hives so near a place where persons or animals may be expected to be as to make it appear likely that the bees will be angered by their presence and attack them. Thus it has been held negligence to locate the hives near a post in a highway used for tying the horses of visitors to the owner's premises (Parsons v. Manser [1903], 119 Ia. 88, 93 N. W. 86, 62 L. R. A. 132, 97 Am. St. Rep. 283), to locate a large number of hives (about 140) on the narrow confines of a village lot (Olmsted v. Rich [1889], 3 Silv. [N. Y.] 826, 6 N. Y. Sup. 826) or so near the line of

another's premises as to endanger horses working in a field harvesting grain between the hives and a buckwheat field. Lucas v. Pettit (1906), 12 Ont. L. Rep. 448, 8 Ontario Weekly Notes 315; Tellier v. Pelland (1873), 5 Rev. Leg. (Que.) 61.

It is negligence to handle bees at such a time or in such a manner as will likely cause them to attack persons or animals in the neighborhood. Thus where defendant undertook to remove the honey from his hives by smoking the bees from the supers a few yards from where plaintiff was hitching his horse to a cart without warning him, it was held defendant was liable when the bees stung the horse, causing him to bolt and injure plaintiff so that he died therefrom pending the action. O'Gorman v. O'Gorman (1902), 2 Irish Rep. 753.

There has been recently issued by The American Honey Producers' League, Madison, Wis., a text-book on the Law Pertaining to the Honeybee, prepared by the legal department of the League, of which Mr Colin P. Campbell is general counsel.

HUMOR

One of Charles Lamb's famous witticisms was directed toward an embryo lawyer, who upon receiving his first brief, called in delight upon Lamb to tell him of it.

"I suppose," said Lamb, "you addressed that line of Milton to it, 'Thou first best cause, least understood.'"

Mr. Frank Wisdom, of Bedford, Iowa, sends this one:

United States Senator Cummins, of Des Moines, and State Senator Jamison, of Osceola, were attorneys engaged in resisting the probate of a will, in the district court at Osceola, Iowa. They were both distinguished attorneys and shrewd cross-examiners, and the trial had brought a full courtroom, and everybody knew the lawyers and the witness—a local doctor, noted for his eccentricities, wit, and learning. He had just testified for the proponent, that the deceased, at the time he made the will, was of sound mind and memory. Jamison secured from his willing colleague the right to cross-examine and he went at it in this amiable and friendly way:

"You say, Doctor, that the deceased at the time he executed the will was of perfectly sound mind?"

"I do, sir."

"Doctor, is it not a fact that you yourself have been brought before the court on a charge of insanity?"

Quick as a flash came the answer, audible to every person in the room:

"Yes, I have, Senator, and that's where I have the advantage over you. I have been judicially declared to be sane, and you have not."

After some moments the court was able to restore order, but the cross-examination had lost all of its pungency.

ITEMS OF PROFESSIONAL INTEREST

AMERICAN FOREIGN LAW ASSOCIATION FORMED

The first meeting of the American Foreign Law Association was held at the Bar Association Building, New York City, on March 5th. A large number of lawyers from New York and other cities attended. The members of the General Council were elected and speeches were made attesting the value of the Association and indicating the work.

The purpose of the Association is to be of practical service to those lawyers who make a specialty of the laws of countries other than the United States. The need of adequate knowledge of foreign law has become very marked since America assumed its present position in foreign trade and American capital has sought investment all over the world.

The officers of the Association elected by the General Council immediately after the meeting of members are: W. W. Smithers, of Philadelphia, President; Guy Van Amringe, of New York, Vice-President; G. Evans Hubbard, of New York, Secretary-Treasurer. The office of the Secretary-Treasurer of the Association is to be in the National City Building, 17 East 42nd Street, New York City.

The members of the General Council are: Hon. Theodore E. Burton, of Cleveland, Ohio; Prof. Manley O. Hudson, of the Harvard Law School; Charles B. Fernald, of New York; Judge Otto Schoenrich, of New York; Judge C. S. Lobingier, formerly of Shanghai; William W. Smithers, of Philadelphia; Guy Van Amringe, Phanor J. Eder, Arthur K. Kuhn, all of New York. Mr. Smithers is Chairman of the Comparative Law Bureau of the American Bar Association, Mr. Van Amringe is Chairman of the Special Committee on Private International Law and Conflicts of Laws of the Bar Association of the City of New York.

Among those who addressed the meeting on March 5th were Mr. David Hunter Miller, Mr. Ralph S. Rounds and Mr. Edward Schuster. The membership includes Mr. Henry W. Taft, President of the Bar Association of the City of New York; Professor Williston, of Harvard Law School; Mr. Charles Bernheimer, Mr. G. B. Compton, Mr. F. R. Coudert, Jr., Mr. S. Mallet-Prevost, Mr. S. A. Pleasants, Mr. Harrington Putnam, Mr. Jose Savage, and Mr. H. B. Twombley.

The objects of the Association, as stated in the Constitution, are "the advancement of the

study, understanding and practice of foreign, comparative and private international law, the promotion of solidarity among members of the legal profession who devote themselves wholly or in part to those branches, the maintenance of adequate professional standards relative to such members, and active co-operation with learned societies devoted to such subjects, like the Comparative Law Bureau of the American Bar Association, the Societe de Legislation Comparee, etc."

Active membership is open to members of our Bar and members of the Bar of foreign countries may become associate members.

BOOK REVIEW

COOK'S CASES ON EQUITY

Walter Wheeler Cook, Professor of Law, Yale University, is the author of "Cases and Other Authorities on Equity," published by the West Publishing Company, Volume 3 of which has just been received. This volume contains Reformation, Rescission and Restoration, at law (quasi-contracts) and in equity. The cases are selected from decisions of English and American courts. These volumes belong to the American Case Book Series. Explanation of the work and its purpose is stated by the author as follows:

"The collection of cases in the present volume represents an attempt to combine the material usually presented in advanced equity courses dealing with reformation, rescission and restitution with that contained in the course commonly called quasi-contracts. Asked a number of years ago to teach both courses, the editor soon found that to a very large extent the two courses dealt with the same, or at least very similar, situations; one being limited to a discussion of the common-law remedies available, chiefly by way of an action leading to a money judgment, the other to equitable remedies. Underlying a large part of both was the principle forbidding so-called 'unjust enrichment.' Tentative experiments with a combination course dealing with reformation, rescission and restitution, at law and in equity, on the ground of misrepresentation and mistake, satisfied the editor that, for students who had had one fundamental equity course and were familiar with the usual first-year subjects, such a course was an improvement over the two separate courses. The combination has been extended to cover the other topics commonly grouped under quasi-contracts, and having as a rule corresponding doctrines in equity, such as duress, illegality, impossibility, waiver of tort, etc.

"The arrangement of the cases has been guided by pedagogical rather than more abstractly logical considerations. As the attempt is to make a new synthesis of the cases for teaching purposes, it is realized that at many points the selection and arrangement may quite possibly leave much to be desired. As the stencils from which successive editions of mimeographed cases were made are worn out, and as a number of other teachers have expressed a desire to try the experiment, the collection is printed as it stands, without waiting for the improvements which may come with additional use. Some of the later portions of the book have been rather more copiously annotated than the earlier portions. The purpose has been to enable the teacher to assign some of these parts as reading to be done outside the classroom, not to be taken up in class. Frequent references are for this reason given, not only to other cases, but to some of the best discussions in text books and periodicals. In fact, throughout references have been given to corresponding portions of the best texts, etc., in the hope that thereby students will be led to become familiar with the standard works. Long lists of cumulative citations have been omitted; in their place are references to notes in texts, cyclopedias, or law reviews, where such citations can be found. The citations given are to cases selected somewhat carefully, either for their opinions or because the states of fact involved are of interest. Many of these it was desired to print in the collection, but limitations of space made their omission imperative. Experience has satisfied the editor that confining the citations in this way is in the long run more likely than the longer lists to induce the student to read cases not in the casebook.

"The editor will be grateful to any teachers who may use the book for suggestions for improvements in selection or arrangement which might be made in a second edition. He desires also to incorporate by reference the preface to the first volume of the series."

DIGEST

Digest of Important Opinions of the State Courts of Last Resort and of the Federal Courts.

Copy of Opinion in any case referred to in this Digest may be procured by sending 25 cents to us or to the West Pub. Co., St. Paul, Minn.

1. **Admiralty**—Repairs on Vessel.—Repair work on a completed vessel has a direct relation to navigation, and the rights and liabilities of the parties depend on the general maritime law, and cannot be enlarged or impaired by state statutes.—Robins Dry Dock & Repair Co. v. Dahl, U. S. S. C., 45 Sup. Ct. 157.

2. **Agriculture**—Injury at Fair Exhibit.—A fair association, giving public exhibitions of fireworks for which admission is charged, is under non-delegable duty to maintain in reasonably safe condition its buildings, structures, walks and grounds, to provide spectators with reasonably safe place from which to view entertainment, to police its grounds, and to give spectators notice of places to which they are assigned.—Blue Grass Fair Ass'n v. Bunnell, Ky., 267 S. W. 237.

3. **Animals**—"Running at Large."—While crossing a public highway traversing a farm, horses, going from an inclosure on one side of the road to the barnyard on the other side are not "running at large," within the meaning of section 6063, Gen. St. 1913, although no one is in charge of them while upon the road.—Lackey v. Peterson, Minn., 201 N. W. 428.

4. **Auctions and Auctioneers**—Municipal Regulation.—Ordinance requiring auctioneers to keep sales book, to be signed by purchaser at time of purchase and before any other article is put up for sale, and providing that, if sale is declared and no purchaser comes forward, next highest bidder shall have right to sign book and demand article, held not unreasonable or arbitrary.—Carlton v. City of Watertown, N. Y., 207 N. Y. S. 339.

5. **Automobiles**—Agency of Husband.—Proof of the wife's ownership of an automobile, which was being driven on the public highway by her husband, raises a presumption of fact that it was being driven by him as her agent, and that he was acting within the scope of his agency. Evidence that such automobile was a "family car"; that it was owned by the wife, who gave her husband "permission to drive it for her"; that at the time of the accident, by an arrangement between them, he was driving to the home of his parents to get his wife, who had gone there to make a call, presents at least a jury question upon the topic of agency of the husband; and the mere fact that the husband had a friend with him in the car, and that he intended to stop on the way, did not jusify a direction of a verdict for the defendant owner.—Venghis v. Nathanson, N. J., 127 Atl. 175.

6.——Dust Cloud.—Drivers of automobiles on narrow road approaching in opposite directions, who failed to stop until impenetrable cloud of dust raised by third automobile in passing one of them had subsided, held negligent.—Castille v. Richard, La., 102 So. 398.

7. **Bankruptcy**—Conditional Sale.—Claimant furnished wire to bankrupt, an electrical company, to be sold and used as required in its business, under a contract which required it to report monthly the quantity so used or sold and to pay for the same; the contract providing that the wire should remain the property of claimant until so reported sold and charged to bankrupt. Held that, though called a coisignment contract, it was not one of bailment or agency, but one of conditional sale, and that, under the law of Illinois which subjects property held under such contracts to levy by execution creditors of the buyer, so much of the wire as remained at the time of bankruptcy was not subject to reclamation by the seller.—In re United States Electrical Supply Co., U. S. D. C., 2 Fed. (2d) 378.

8.——Contempt.—An order adjudging a bankrupt in contempt for "refusing to be examined according to law," in violation of Bankruptcy Act, § 41, subd. 4 (Comp. St. § 9625), based on a finding of the referee, affirmed by the District Judge, held sustained, where bankrupt, though submitting to examination, failed reasonably to explain a shrinkage of some $40.000, in his stock of merchandise worth $50.000, but throughout his examination showed a disposition to evade and refuse to reveal the disposition of his assets.—Haimsohn v. United States, U. S. C. C. A., 2 Fed. (2d) 441.

9.——Excess Profits Tax.—Where partnership was incorporated in 1919, and corporation was adjudicated bankrupt in 1922, additional excess profits tax assessed in 1923 against profits of partnership earned in 1917 had priority over claims of other creditors, corporation being chargeable with notice of former partners, and Rev. St. § 3186 (Comp. St. § 5908), does not apply, and it was immaterial that bankruptcy trustee had no notice of bankrupt's liability for taxes.—Heyward v. United States, U. S. C. C. A., 2 Fed. (2d) 467.

10.——Insurance of Mortgaged Property.—Where mortgaged property of bankrupt was insured during the bankruptcy proceedings, loss payable to the mortgagee to the amount of its lien, the remainder being for the protection of general creditors, and the property was afterward sold free of liens for less than the mortgage debt, the insurance premiums are a lien on the fund prior to that of the mortgagee only to the extent that the premiums were for insurance for its benefit.—In re Rotary Tire & Rubber Co., U. S. C. C. A., 2 Fed. (2d) 364.

11.——Offset.—The defendant was the owner of an overdue note of the bankrupt and another person. In a connected transaction a sum of money was paid to him to be paid to the bankrupt if a stock of goods then sold by the bankrupt should prove to be unincumbered. It was unincumbered, the sale was completed, and the bankrupt became entitled to the money. Held that the defendant was entitled to offset the note against the money.—Meighan v. Cohen, Minn., 201 N. W. 431.

12.——Transfer to Defraud Creditors.—Under Bankruptcy Act, § 70e (Comp. St. § 9654), authorizing bankruptcy trustee to avoid any transfer by bankrupt, which creditors might have avoided, transfer of stock of merchandise, in violation of Rev. St. Tex. art. 3971 (Vernon's Ann. Civ. St. Supp. Tex. 1918, art. 3971), regulating bulk sales, might be set aside in suit by trustee, and four months limitation of section 67e (Comp. St. § 9651) did not apply.—Gross v. Grossman, U. S. C. C. A., 2 Fed. (2d) 458.

13.——Trustee an Officer de Facto.—Person appointed as bankruptcy trustee by referee, who without objection acted as such for three years, was at least officer de facto, and his acts and authority could not be inquired into collaterally.—In re Rury, U. S. C. C. A., 2 Fed. (2d) 331.

14. **Banks and Banking**—Authority of President.—Where board of directors of defendant bank did not meet more than twice a year, and all affairs were in charge of its president, his contract of guaranty, even though not expressly authorized by board of directors as required by by-laws, held binding.—Washington Grocery Co. v. Citizens' Bank of Anacortes, Wash., 231 Pac. 780.

15.——Dishonor of Check Sold to Plaintiff by Bank.—Where plaintiff purchased check on German bank from bank which had sufficient credit therein, contract was executed, and plaintiff was not entitled to rescission because German bank was not paying checks when he was in Germany,

and action for money had and received did not lie. —Moe v. Bank of the United States, N. Y., 207 N. Y. S. 347.

16.——Forged Indorsement.—Where bank in which check with forged indorsement was deposited and person who made deposit were brought in as defendants, in maker's action against bank which paid check, under Civil Practice Act, § 193, subd. 2, bank which paid check and was liable to maker was entitled to recover from bank in which check was deposited, and such bank was entitled to recover from person who deposited check, under rule that indorser warrants genuineness of all prior indorsements.—Kleinman v. Chase Nat. Bank, N. Y., 207 N. Y. S. 191.

17.——Forged Indorsement.—Where maker gave check to payee's agent, who forged payee's indorsement thereon and absconded with proceeds, bank, in cashing check, violated its obligation to maker to pay check only to payee, and was not entitled, in action by maker, to have payee interpleaded as defendant in its stead.—Greenwald v. State Bank, N. Y., 207 N. Y. S. 214.

18.——Non-Payment of Checks.—Complaint of depositor, suing bank for its refusal to pay checks which he drew on it, must allege that at time of presentation of checks depositor had to his credit in bank sum at least equal to amount of such checks.—Reicher v. Trade Bank of New York, N. Y., 207 N. Y. S. 178.

19.——Pledged Stock.—Where Stock indorsed by owner was wrongfully pledged with bank by indorsee, bank acquired good title to the extent of its advances of money made in good faith thereon. —Heymann v. Hamilton Nat. Bank, Tenn., 266 S. W. 1043.

20.——Stockholders' Liability.—Subscription of stock in national bank, obtained by false representations, is not void, but only voidable, and shareholder, who permits name to be shown on books of bank as shareholder, is subject to stockholders' liability under Federal Reserve Act Dec. 23, 1913, § 22 (Comp. St. § 9689) and Rev. St. § 5220 (Comp. St. § 9806).—Taylor v. American Nat. Bank, U. S. D. C., 2 Fed. (2d) 479.

21. **Benefit Societies**—Reinstatement.—By-laws of a fraternal beneficiary society permitted reinstatement of a member after suspension for nonpayment of dues, by payment of arrearages and dues within a grace period, provided the member was in good health, and payment for purpose of reinstatement constituted a warranty of good health. Held, good health in fact was required, and the requirement was not satisfied by appearance of good health or reasonable belief that the member was in good health.—Pickens v. Security Ben. Ass'n, Kan., 231 Pac. 1016.

22. **Bills and Notes**—Accommodation Indorser.—Notes executed to vendor for purchase price of land, and sold to plaintiff bank, vendor indorsing same, were not for vendor's accommodation within Ky. St. § 3720b, dispensing with notice of dishonor to accommodated indorser.—Farmers' Bank & Trust Co. v. Dent, Ky., 267 S. W. 202.

23.——Denial of Validity.—Where makers of note, with knowledge of all facts, did not deny validity of note until after administration of holder's estate, and then accepted share in residue of estate which was increased by such note, they are estopped to deny its validity as against plaintiff, to whom the note was assigned under holder's will. —Fahrbach v. Fahrbach, Wis., 201 N. W. 529.

24.——Negotiability.—Generally a statement on face or in body of a promissory note, that note is a part of another agreement, does not affect or destroy its negotiability, when it is negotiable in form.—Utah Lake Irr. Co. v. Allen, Utah, 231 Pac. 818.

25.——Obligation of Corporation.—Note, "We promise to pay," signed by corporation and defendant, with words "Executive Board" opposite defendant's name, held obligation of corporation alone where defendant was duly authorized to execute it in corporation's behalf, in view of Negotiable Instruments Law; words "Executive Board" being added to defendant's signature within section 6061, and nominative "we" designating corporation aggregate.—Wright v. Drury Petroleum Corporation, Mich., 201 N. W. 484.

26.——Renewal Note.—Extension of time of payment by renewal note, signed by one signing original note after transaction between maker and payee was closed, held sufficient consideration to bind him, though he did not know he was not liable on original note, in absence of claim that misunderstanding was induced by any act of payee. —Wise v. Boyd, Tex., 267 S. W. 543.

27.——Statement of Transaction in Note.—Under Negotiable Instruments Law, § 1, note containing provision qualifying or limiting promise to pay, as by making it subject to terms and conditions of contract referred to, is not negotiable, though payable to order, but mere statement of transaction giving rise to instrument does not render it nonnegotiable (section 3).—Tyler v. Whitney-Central Trust & Savings Bank, La., 102 So. 325.

28. **Carriers of Goods**—Notice of Arrival.—Requirement of notice by telegraph from railroad to consignor, when shipment remains unclaimed for five days, applies only to effort by railroad to hold consignor for demurrage charges, and does not touch consignee's liability therefor.—Boney v. Atlantic Coast Line R. Co., S. C., 126 S. E. 46.

29. **Carriers of Passengers**—Delivery of Baggage. —When carrier delivers property received by it for transportation to any one not authorized to receive it, such delivery is a "conversion," and renders carrier liable, even though caused by an innocent mistake.—Jester v. Lancaster, Tex., 266 S. W. 1103.

30.——Private Carriers Not Common Carriers.—Pub. Acts Mich. 1923, No. 209, §§ 1, 2, 7, making all persons engaged in business of transportation of persons or property for hire by motor vehicle over public highways common carriers, prohibiting them from engaging in such business without permit, and requiring them to carry insurance or executive indemnity bonds, held burden on interstate commerce, not within police power as applied to private carrier engaged exclusively in interstate commerce.—Michigan Public Utilities Commission v. Duke, U. S. S. C., 45 Sup. Ct. 191.

31. **Commerce**—Contract to Furnish Ships.—Interstate Commerce Act, held inapplicable to contract to furnish ships for transportation from Mobile to Pacific Coast, in absence of continuous shipment or through bill of lading from inland point.—American Cast Iron Pipe Co. v. Atlantic, Gulf & Pac. S. S. Corporation, U. S. D. C., 2 Fed. (2d) 397.

32. **Constitutional Law**—Leasing State Land.—Act General Assembly March 5, 1924 (33 St. at Large, p. 1513), leasing land theretofore used as public square for erection of building to contain offices of county and home demonstration agents and other county offices or auditorium for public assemblage, free of rent, held not violative of Const. art. 1, § 5, and Const. U. S. Amend. 14, prohibiting the taking of property without due process of law.—Antonakas v. Anderson Chamber of Commerce, S. C., 126 S. E. 35.

33.——Rule of Procedure in Legislature.—A taxpayer has such an interest in having appropriations made in the manner fixed by the Constitution that he can raise question of constitutionality of rule prescribed by statute requiring two-thirds vote to alter or amend budget bill.—Tayloe v. Davis, Ala., 102 So. 433.

34.——Sale of Kosher Meat.—Laws N. Y. 1922, cc. 580, 581, making it a crime to sell or expose for sale, with intent to defraud, meat or meat preparation falsely represented to be "kosher," or product "sanctioned by orthodox Hebrew religious requirements," held not violative of due process or equal protection clause of Fourteenth Amendment, even though word "kosher" and phrase "orthodox Hebrew religious requirements" are indefinite and uncertain, in view of the intent to defraud required.—Hygrade Provision Co. v. Sherman, U. S. S. C., 45 Sup. Ct. 141.

35. **Contracts**—Rescission.—Party to contract may justify asserted termination, rescission, or repudiation of the contract by proving that there was, at the time, adequate cause, although it did not become known to him until later.—College Point Boat Corporation v. United States, U. S. S. C., 45 Sup. Ct. 199.

36. **Corporations**—Imputable Knowledge.—That president and managing director of securities corporation was intrusted with purchase and sale of securities did not impute to corporation knowledge of his purchase of securities from another director, such transaction not being within his general authority, and transaction was not binding on corporation.—Norwegian-American Secur. Corp. v. Schenstrom, N. Y., 207 N. Y. S. 163.

37.——Ownership of Stock.—Ownership of certificates of stock of New Jersey corporation, transferable by indorsement in blank, is governed by law of place where certificates are located.—Directon Der Disconto-Gesellschaft v. U. S. Steel Corp., U. S. S. C., 45 Sup. Ct. 207.

38.——Repurchase of Stock.—Where trustee purchased certain shares of stock which were registered in name of plaintiff, but were immediately indorsed in blank by latter and delivered to trustee, who placed them with other trust property, held under Standard Uniform Transfer Act (St. 1923, § 183.01) and by universal custom, plaintiff thereby was divested of tit'e and color of title to stock, and could not sue on a contract for repurchase of such stock on behalf of corporation.—Desmond v. Pierce, Wis., 201 N. W. 742.

39.——Subscription to Stock.—A written agreement between a corporation and a business men's committee to induce corporation to establish manufacturing plant, stating that defendants will within 30 days subscribe for stock to amount of $5,000, and that in event that such sum shall be raised certain things will be done, held not to constitute a subscription to stock in corporation, but at most merely an agreement to subscribe.—Barnhard's Vegetable Beverage Mfg. Co. v. Callahan, Wash., 231 Pac. 789.

40. **Covenants** — Building Restriction.—Building restriction in conveyance, prohibiting erection of any building other than a residence, held not violated by erection of two-family flats, in view of construction placed on such restriction by owner and his grantees; it being immaterial that such construction was erroneous.—Killian v. Goodman, Mich., 201 N. W. 454.

41. **Explosives**—Containers.—Burns' Ann. St. 1914, § 2702a, requiring sale of gasoline in red cans, held not to make it unlawful to deliver kerosene to a purchaser in red cans furnished by him.—Barnett v. Sinclair Refining Co., Ind., 145 N. E. 894.

42. **Frauds, Statute of**—Verbal Promise.—Husband's verbal promise to put title to one-half interest in land in wife's children, held unenforceable under statute.—Malone v. Romano, N. J., 127 Atl. 91.

43. **Insurance**—Cause of Injury.—Where automobile is driven by one under age specified in policy, if while the car is being so driven, it is injured without causal connection between the driving and the injury, the company is liable. There must be causal connection between the driving of the car and the injury received.—Hossley v. Union Indemnity Co. of New York, Miss., 102 So. 561.

44.——Fire Policy.—Mere negligence by insured or willful incendiarism by another without insured's consent does not bar recovery on fire policy.—Weiner v. St. Paul Fire & Marine Ins. Co., N. Y., 207 N. Y. S. 279.

45.——Refusal to Pay Loss.—Under Rev. St. 1919, § 6337, court or jury may in addition to loss, on insurer's vexatious refusal to pay loss, allow plaintiff damages not to exceed 10 per cent and any reasonable attorney's fees, and court may enter judgment for aggregate sum found in verdict.—Schwartz v. National Acc. Soc., Mo., 267 S. W. 87.

46.——Suicide as "Accidental Death."—Sucide by a person while insane is "death by accident," and Rev. St. 1919, § 6150, prohibiting insurance companies from contracting against liability for death by suicide while insane, unless suicide was contemplated when application was made, applies to accident insurance companies.—Mayhew v. Mutual Life of Illinois, Mo., 266 S. W. 1001.

47.——Terms of Policy.—Where a policy of indemnity insurance provides this policy does not cover any automobile vehicle being driven by any person in violation of law as to age, or if there be no age limit, under the age of 16 years, the indemnity company is not liable for injuries resulting proximately by being driven by a person under 16 years of age, regardless of whether the owner agreed for such person to drive the car or not, as the company did not assume the risk from such driving.—Hossley v. Union Indemnity Co. of New York, Miss., 102 So. 561.

48. **Internal Revenue**—Railroad Equipment Certificates.—Railroad equipment certificates, issued by trust company under agreement by which equipment was purchased and leased to railroad, which certificate provided for payment by trustee to holder of certificates of a stipulated sum only out of rentals under the lease, held "corporate security," within Act Feb. 24, 1919, tit. 11, § 1100, and Schedule A(1), 40 Stat. 1057, 1133, 1135 (Comp. St. Ann. Supp. 1919, §§ 6318i-6318p, 6371¼a), making such securities subject to stamp tax.—Lederer v. Fidelity Trust Co., C. S. S. C., 45 Sup. Ct. 206.

49. **International Law**—Acts of De Facto Government.—While unrecognized government may be viewed juridically as no government, if power withholding recognition so chooses, government de facto, though formally unrecognized because deemed unworthy of place in society of nations, may possibly gain quasi governmental validity for its acts and decrees, if violence to fundamental principles of justice or public policy might otherwise be done.—Sokoloff v. National City Bank, N. Y., 145 N. E. 917.

50. **Joint Adventures**—Sharing of Profits and Losses.—To constitute "joint adventure," it is not sufficient that parties share in profits and losses, but they must intend to be associated as partners, either as general partners, or merely for duration of joint adventure, and same rules govern partnerships and joint adventures.—Hutchinson v. Birdson, N. Y., 207 N. Y. S. 273.

51. **Joint Stock Companies and Business Trusts**—Trustee's Powers.—One contracting with a trustee under a trust instrument with knowledge that he purports to be acting, not for himself alone, but also for his co-trustees, is bound at his peril to learn the extent of his powers.—De Witt v. Cabanne, U. S. C. C. A., 2 Fed. (2d) 322.

52. **Landlord and Tenant**—Underletting.—A mere permissive use of the sidewalk in front of leased premises which amounts to nothing more than a license is not a breach of a covenant "not to underlet said premises or any part thereof."—Hoffman v. Seidman, N. J., 127 Atl. 199.

53. **Licenses**—Itinerant Automobile Dealers.—A municipal ordinance of the city of La Grange, imposing upon itinerant automobile dealers having no place of business in that city paying open-door license and at which stock subject to taxation is carried, an occupation tax in the sum of $200 is void, because, under the facts of this case, it imposes an unreasonable, excessive, and prohibitive tax.—Huguley-McCulloh Auto Co. v. City of La Grange, Ga., 125 S. E. 799.

54. **Master and Servant**—Brawl With Fellow Employee.—Where claimant, angered when fellow employee took pencil from behind claimant's ear, slapped fellow employee, who retaliated by striking claimant on jaw, which caused injury resulting in abscess of cheek, held that injury did not arise out of or in "course of employment."—Plouffe v. American Hard Rubber Co., N. Y., 207 N. Y. S. 373.

55.——Locomotive Boiler Explosion.—Under Boiler Inspection Act, § 2 (Comp. St. § 8631), it is absolute duty of carrier to have locomotive boilers in safe condition to operate, so that they may be used without unnecessary peril to employees, and such duty is continuing.—Baltimore & O. R. Co. b. Groeger, U. S. S. C., 45 Sup. Ct. 169.

56. **Municipal Corporations**—Ice on Sidewalks.—Where, as result of unusually severe snowstorm, in which rain alternating with snow froze into solid mass and could not be removed, except with picks, and traffic was tied up in all parts of city notwithstanding emergency measures, city was not negligent in failing to remove ice on sidewalk on which plaintiff fell 61 hours after storm ceased.—Eckert v. City of New York, N. Y., 207 N. Y. S. 168.

57.——Zoning Ordinance.—If the power to pass such zoning ordinance be conceded, the city council could exempt from its operation any applicants who had filed, in accordance with existing laws, plans, and specifications, or corrected plans and specifications, prior to the adoption of such ordinance. The classification or exemption of such persons is not invalid.—State v. Hauser, Ohio, 145 N. E. 851.

58. **Navigable Waters**—Withdrawal from Lake Michigan.—Under Act March 3, 1899, § 10 (Comp. St. § 9910), prohibiting change in condition or capacity of navigable water of United States, unless work has been recommended by Chief of Engineers and authorized by Secretary of War, and section 12 (Comp. St. § 9917), making violation a misdemeanor, water in excess of amount authorized by Secretary of War, cannot be withdrawn from Lake Michigan.—Sanitary Dist. v. United States, U. S. S. C., 45 Sup. Ct. 176.

59. **Negligence**—Attractive Nuisance.—The attractive nuisance doctrine, as applied to injuries received by trespassing children, has no application to the case of a trespassing child injured while playing around a planing mill by coming in contact with a rapidly revolving unguarded shafting, where the danger of such contact was manifest, and the child was fully capable of and did appreciate the danger.—Salter v. Deweese-Gammill Lumber Co., Miss., 102 So. 268.

60.——Obstruction on Sidewalk.—Pedestrian falling over iron beam, moved to sidewalk three months before by another than owner, which had placed it on abutting lot, for use in building thereon, securely away from pedestrian traffic, cannot recover from owner, unless latter had actual knowledge that beam had been moved.—McMahon v. Joseph Greenspon's Sons Iron & Steel Co., Mo., 267 S. W. 83.

61. **Principal and Agent**—Fact of Agency.—"The fact of agency may be established by the direct testimony of the one who has assumed to act as agent (Friese v. Simpson, 15 Ga. App. 786 [4], 84 S. E. 219); and while the previous declarations of an alleged agent are not by themselves admissible to prove agency (Harris Loan Co. v. Elliott Typewriter Co., 110 Ga. 302 [1], 34 S. E. 1003; Americus Oil Co. v. Gurr, 114 Ga. 624 [1], 40 S. E. 780), after any such direct testimony has been admitted, or the fact of agency has been clearly indicated by proof of circumstances, apparent relations, and the conduct of the parties (Cable Co. v. Walker, 127 Ga. 65 [1], 56 S. E. 108), the declarations of the alleged agent, though inadmissible if standing alone, become admissible as a part of the res gestae of the transaction, and as such may be considered in establishing the fact of agency." Render v. Hill Bros., 30 Ga. App. 239 (1), 117 S. E. 258.—Scott v. Kelly-Springfield Tire Co., Ga., 125 S. E. 773.

62.——Ownership of Lists.—Generally lists or compilation of information prepared by an agent in the course of agency and communicated to principal are property of principal, and not of agent.—Arrant v. Georgia Casualty Co., Ala., 102 So. 447.

63. **Railroads**—Aggravating Circumstances.—Where there was evidence that rain which struck deceased was being operated on stormy night over public crossing at 55 miles per hour, without headlight or signal, held instruction authorizing jury to consider aggravating circumstances in assessing damages for death was not erroneous.—Garrett v. Missouri Pac. R. Co., Mo., 267 S. W. 91.

64.——Grade Crossings.—Transportation Act (U. S. Comp. St. Ann. Supp. 1923, § 10071¼ et seq.) does not expressly or by implication give Interstate Commerce Commission power to eliminate grade crossings nor prohibit state authorities from so doing.—State v. Public Service Commission, Mo., 267 S. W. 102.

65. **Sales**—Agreement to Deliver German Marks.—Agreement to deliver German marks during specified month, held not sale of credit, but sale of goods, under Personal Property Law, § 156.—Zimmerman v. Roessler & Hasslacher Chemical Co., N. Y., 207 N. Y. S. 370.

66.——Refusal to Accept.—Where buyer extended time for delivery of lumber and, on delivery thereof, declined without inspection, or objection to qualify, to receive lumber purely on the ground that the contract price was more than the market price, seller was entitled to damages sustained on resale of lumber at less than contract price.—Little v. Veneer Mfg. Co., S. C., 126 S. E. 42.

67. **States**—Boundaries.—Line marked by surveyor employed by Commissioner of General Land Office under 14 Stat. 457, 466, adopted as true boundary between Colorado and New Mexico by United States government, and recognized and acquiesced in as the boundary, and adopted and recognized as boundary by New Mexico after admission to statehood, will not be disturbed in suit by New Mexico on theory that it does not accord with thirty-seventh parallel of north latitude, described as common boundary by Act March 3, 1875, Act June 20, 1910, Const. Colo. art. 1, § 2, and Const. N. M. art. 1, notwithstanding government's temporary recognition of other line fixed by survey under Act July 1, 1902.—State of New Mexico v. State of Colorado, U. S. S. C., 45 Sup. Ct. 202.

68. **Taxation**—"Educational Institution."—The shortness of their course, the narrow field of their instruction, and the utilitarian character of their aims do not prevent schools of the type usually described as business colleges from being regarded as "educational institutions" within the meaning of the constitutional provision exempting from taxation property used exclusively for educational purposes.—Bussing v. Lawrence Business College, Kan., 231 Pac. 1039.

69. **Torts**—Demand for Compensation.—One who, having sustained an injury growing out of a tort which constitutes a crime, demands of the wrongdoer what the demandant in good faith believes is a reasonable compensation therefor, and supports h's demand by charging the wrongdoer with having committed a crime out of which arose the injury, and threatens to prosecute the wrongdoer therefor if the demand be not complied with, does not thereby violate the provisions of section 13384, Genera' Code. Mann v. State, 47 Ohio St. 556, 26 N. E. 226, 11 R. A. 656, approved and followed.—State v. Barger, Ohio, 145 N. E. 857.

70. **United States**—Assignment of Contract.—Assignment, as security by contractor with the United States of its interest in a special fund created by contract by it with others, and consisting of money borrowed to carry on contract with the United States and money received from the United States on account of the government contract, held not a transfer or assignment of a contract with or claim on the United States, in violation of U. S. Comp. St. §§ 6383, 6890.—Irwin's Bank v. Fletcher Savings & Trust Co., Ind., 145 N. E. 869.

71. **Vendor and Purchaser**—Reasonable Time.—The contract provided that the vendees were to pay the deferred portion of the purchase price on or before a given date and that the vendors were to convey free from incumbrance. The vendees, knowing there was a mortgage on the land, tendered payment before the given date without prior notice and demanded their deed, and on the same day brought an action for rescission on the ground that the vendors were in default because unable to convey free from incumbrance at the time of the tender. Held, that their attempt to rescind was ineffectual as the vendors were entitled to a reasonable time after the tender in which to perform.—Trainer v. Lammers, Minn., 201 N. W. 540.

72. **Wills**—Testamentary Capacity.—In a suit to annul a will on the ground of mental incapacity of the testator, mere infirmity of mind and body, due to a paralytic stroke, is not sufficient to overcome the legal presumption of capacity in the testator; the true test of his mentality is to be determined as of the time the will was made and executed, and it must affirmatively appear that he did not then have mind sufficient to understand the nature and consequences of his act, the property to be disposed of, and the objects of his bounty. A case in which the principle herein announced is applied.—Payne v. Payne, W. Va., 125 S. E. 818.

73. **Workmen's Compensation**—Course of Employment.—Employee held in "course of employment" while on way from room in mine, where he worked, to outside.—Big Elkhorn Coal Co. v. Burke, Ky., 267 S. W. 142.

74.——Loss of Eye.—Compensation for the loss of the use of an eye, paid under a settlement between the employee, employer, and insurer, does not debar the employee from recovering the full schedule compensation specified in the law for the removal of the same eye, injured in a subsequent employment under a different employer, it appearing that the employee recovered from the first injury so that in certain positions he could read print and note approaching objects.—Wareheim v. Melrose Granite Co., Minn., 201 N. W. 543.

75.——Loss of Sightless Eye.—For the removal of a sightless eye, necessitated by an industrial accident, a workman is entitled to receive compensation for the loss of an eye as provided by the Workmen's Compensation Act.—Mosgaard v. Minneapolis St. Ry. Co., Minn., 201 N. W. 545.

76.——Recovery Against Wrongdoer.—In administrator's action, under Rem. Comp. Stat. 1922, §§ 183, 183—1, for death of employee insured by his employer, according to Workmen's Compensation Law of California, what decedent's widow was awarded and accepted under such policy was insurance, and did not constitute a bar to her recovery of compensation for the injuries caused by wrongdoer.—Reutenik v. Gibson Packing Co., Wash., 231 Pac. 773.